

FEDERAL CIRCUIT COURT OF AUSTRALIA

*RAZA KHAN v MINISTER FOR IMMIGRATION
& ANOR*

[2016] FCCA 1905

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner Temporary (Class UK) visa – whether Tribunal erred in only considering circumstances in existence at the time of application – *Waensila error* – whether any useful result would flow from grant of relief – Court’s discretion not to grant relief – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 64, 359A, 476.

Migration Regulations 1994, r. 1.15A, sch.2, cl.820.211

Cases cited:

Hussein v Minister for Immigration & Anor [2015] FCCA 890

Pokharel v Minister for Immigration and Border Protection [2016] FCAFC 34

Waensila v Minister for Immigration and Border Protection [2016] FCAFC 32

Applicant:	REHAN RAZA KHAN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 866 of 2016
Judgment of:	Judge Street
Hearing date:	25 July 2016
Date of Last Submission:	25 July 2016
Delivered at:	Sydney
Delivered on:	25 July 2016

REPRESENTATION

The Applicant appeared in person.

Counsel for the First Respondent: Mr T Reilly

Solicitors for the First Respondent: Sparke Helmore

ORDERS

- (1) The application is dismissed.
- (2) The Applicant pay the costs of the First Respondent fixed in the amount of \$5,800.00.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 866 of 2016

REHAN RAZA KHAN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Tribunal made on 9 March 2016 affirming the decision of the delegate not to grant the applicant a Partner Temporary (Class UK) visa. The applicant arrived in Australia on 17 October 2008 on a student visa. On 22 November 2012, the applicant applied for a visa on the basis of his relationship with the sponsor.
2. On 30 July 2014, the delegate rejected the application. A differently constituted Tribunal affirmed the decision of the delegate on 24 February 2015 and on 19 October 2015 a Court remitted the matter to a Tribunal by consent for a further hearing. On 16 February 2016, the applicant was invited to attend a hearing to take place on 3 March

2016. The applicant appeared on that date to give evidence and present arguments. The Tribunal also wrote to the applicant on 16 February 2016 consistent with s.359A.

3. The Tribunal concluded that the decision under review should be affirmed. The Tribunal identified the requirement of the applicant to meet cl.820.211 in schedule 2 of the *Migration Regulations 1994* at the time the application was made. Clause 820.211 relevantly provides as follows:

(1) The applicant:

(a) is not the holder of a Subclass 771 (Transit) visa; and

(b) meets the requirements of subclause (2), (5), (6), (7), (8) or (9).

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse or de facto partner of a person who:

(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(ii) is not prohibited by subclause (2B) from being a sponsoring partner; and

(c) the applicant is sponsored:

(i) if the applicant's spouse or de facto partner has turned 18--by the spouse or de facto partner; or

(ii) if the applicant's spouse has not turned 18--by a parent or guardian of the spouse who:

(A) has turned 18; and

(B) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(d) in the case of an applicant who is not the holder of a substantive visa--either:

(i) the applicant:

(A) entered Australia as the holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder

who at the time of entry met the requirements of subclause (2A); and

(B) satisfies Schedule 3 criterion 3002; or

(ii) the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.

4. The Tribunal identified that whether the sponsor was a spouse required consideration of the definition in s.5F and in particular the matters identified in s.5F(2)(a) to (d) as well as consideration of each of the matters identified in r.1.15A(3) of the *Migration Regulations 1994*.
5. The Tribunal found that the applicant was not a credible witness and found that the relationship had been contrived and found that the couple had not resided together and were not in a genuine relationship. The Tribunal did not accept that the applicant was a credible witness. The Tribunal identified the financial aspects and found that it considered the financial aspects of the relationship are not consistent with a spousal relationship and do not weigh in favour of the applicant. The Tribunal found that the financial aspects strongly indicate that the relationship was not genuine.
6. The Tribunal referred to the nature of the household and found that evidence of the household aspects of the relationship were not consistent with a spousal relationship. The Tribunal referred to the social aspects and found that the social aspects of the relationship were limited and did not weigh in favour of considering the couple as being in a genuine spousal relationship.
7. The Tribunal made reference to the nature of the commitment to each other and found that there was limited evidence of commitment in the relationship which was consistent with a spousal relationship. The Tribunal said that having considered aspects of the relationship and the evidence provided, the Tribunal did not accept the applicant is in a genuine and continuing relationship with a sponsor or that they are committed to a shared life as husband and wife to the exclusion of all others.

8. The Tribunal found that the applicant did not meet the requirements of s.5F(2)(a) to (d) and was not satisfied that at the time of application or decision that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship was genuine and continuing and that the applicant and spouse lived together and not separately and apart on a permanent basis. It was in these circumstances that the Tribunal found it was not satisfied that at the time of the visa application was made or at the time of the decision, the parties were in a spousal relationship.
9. The Tribunal found that the applicant did not meet cl.820.211(2)(a) and did not meet cl.820.211(2)(d)(ii). The Tribunal noted there was no material before the Tribunal that the applicant met the alternative criteria in cls.820.211(7), 820.211(8), 820.211(2) or 820.221(3). Although not required to do so, the Tribunal then proceeded to consider whether the applicant met the criteria in schedule 3 pursuant to cl.820.211(2)(d). The Tribunal found that the applicant did not in relation to cl.820.211(2)(d) hold a substantive visa within the 28 days of lodging the current application and proceeded to consider whether there were compelling reasons for not applying the schedule 3 criteria.
10. In the course of referring to the compelling reasons, the Tribunal identified authority at that time that supported the consideration of compelling reasons as confined to the time of application. The Tribunal found that there were no compelling reasons for not applying the schedule 3 criteria and found that the applicant did not meet cl.820.211(2)(d)(ii). It was in those circumstances that the Tribunal affirmed the decision of the delegate.
11. On 24 May 2016, a Registrar of the Court fixed the matter for hearing and provided the applicant with an opportunity to file an amended application, affidavit evidence, and submissions. No such documents were filed. On 27 June 2016, a legal practitioner who had apparently been acting for the applicant filed a notice of withdrawal of lawyer. On 15 July 2016, the Court made an order standing the matter over from the hearing date on 18 July to the current hearing date. The grounds of the application are as follows:

- 1. The Second Respondent (at par 73 of its decision) misconstrued par 820.211(2)(d) or Part 820, Sch 2 of*

the Migration Regulations 1994 by concluding that it was as at the time of visa application, as distinct from as at the time the application was finally determined by the Second Respondent, that was the relevant time for determining whether compelling reasons existed; and in so doing the Second Respondent committed a jurisdictional error.

12. At the commencement of the hearing, the Court explained to the applicant that the hearing was one to determine whether the Tribunal's decision was affected by relevant legal error. The Court explained to the applicant that the relevant legal error had to be either an excess of statutory power or a denial of procedural fairness to the applicant. The Court explained that in summary this meant the Court was determining whether the Tribunal's decision was lawful and whether the Tribunal's decision was fair.
13. The Court explained to the applicant that it was satisfied that the Tribunal's decision was affected by relevant legal error and that there was utility in doing so, the Court would set the Tribunal's decision aside and send it back for further hearing. The Court explained that if it was not satisfied that there was relevant legal error and as a matter of discretion, any utility in granting relief, the Court would dismiss the application. The Court explained to the applicant that it would have identified the evidence and then hear submissions from the applicant and then hear submissions from counsel for the first respondent and then hear submissions from the applicant in reply.
14. The applicant confirmed that he understood the nature of the hearing as explained by the Court. From the bar table, the applicant submitted that the Tribunal had made an error and that there was a genuine relationship and that it was not safe for him to go back home.
15. During the course of the applicant's submissions in reply the applicant raised for the first time that he desired an adjournment so that he could instruct a lawyer. The applicant had previously had a lawyer acting for him, and the applicant maintained that he was not able to pay for the services of the lawyer. No earlier notice was given by the applicant of the application for an adjournment. The adjournment was opposed by counsel for the first respondent. Nothing said by the applicant from the

bar table identified any proper basis upon which an adjournment could be said to be of any utility.

16. The Court was not satisfied that an adjournment was warranted in the interests of the administration of justice. An adjournment was only likely to unnecessarily add to the costs of the parties and utilise limited Court time. It was for these reasons that the adjournment was refused.
17. Nothing said by the applicant from the bar table identified any argument of jurisdictional error affecting the Tribunal's findings in relation to cl.820.211(2)(a). Counsel for the first respondent submitted that the present case was one falling within the principles identified in *Pokharel v Minister for Immigration and Border Protection* [2016] FCAFC 34, at [50]. Counsel for the first respondent formally submitted that the decision of this Court in *Hussein v Minister for Immigration & Anor* [2015] FCCA 890 was wrong.
18. Counsel for the first respondent submitted that the Tribunal had made independent findings in relation to whether the applicant was in a genuine spousal relationship, that were an independent and separate finding that supported the Tribunal's decision made under s.65 of the *Migration Act 1958*. Counsel for the first respondent submitted that the error made by the Tribunal in not considering compelling circumstances at the time of decision, was not, in the circumstances of the present case, a jurisdictional error, because of the separate finding.
19. For the reasons given in *Hussein v Minister for Immigration & Anor* [2015] FCCA 890, I reject that submission. I find that the failure of the Tribunal to consider compelling reasons at the time of decision was a jurisdictional error. I accept the submission of the first respondent that this case is of a different kind to that considered in *Hussein*. I find that the finding of fact made in the present case is of a similar kind to that made in *Pokharel*, by reason of which it can be said that there is an independent basis for the adverse finding made by the Tribunal, by reason of which no useful result could flow from the grant of relief.
20. I take into account that the onus is upon the first respondent to satisfy this Court that there could not be any useful result in relation to the discretion, which, for the reasons identified in *Hussein*, is enlivened by reason of the error of the kind identified in *Waensila v Minister for*

Immigration and Border Protection [2016] FCAFC 32. As the Full Court explained in *Pokharel*, as a matter of discretion a Court will not exercise its discretion in favour of granting a Constitutional writ where the jurisdictional error made no difference to the outcome of the application under review. I find that the circumstances of the present case are one where the error that was made, being the *Waensila* error, made no difference to the outcome of the application under review.

21. The adverse finding by the Tribunal in relation to cl.820.211(2)(a) was an independent finding that was not in any way affected by the *Waensila* error. The grounds of the application raise for consideration the error identified in *Waensila*. For the above reasons, although I consider the error identified in the application to be a jurisdictional error, I am not satisfied that there would be any utility in granting relief to the applicant.
22. The independent findings that the applicant did not meet the criteria under cl.820.211(2)(a) were open on the material before the Tribunal, and cannot be said to lack an evident and intelligible justification. I am satisfied that the applicant had a genuine hearing, and there is nothing on the material before the Court to establish any excess of power by the Tribunal in relation to the finding made under cl.820.211(2)(a), nor does the material establish any denial of procedural fairness of the applicant in relation to the adverse finding under cl.820.211(2)(a).
23. No useful result would follow from the grant of relief in the present case, for the circumstances identified above. Further, I am satisfied that this is a case in which the Court is bound by the principle identified in *Pokharel* in relation to that discretionary consideration, and that the independent finding in the present case is of the same kind as identified in *Pokharel*. Accordingly, as a matter of discretion, the Court refuses to grant a Constitutional writ. The application is dismissed.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 2 August 2016